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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

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 10 NEW MOTION, INC.

11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA

13 NEW MOTION, INC. (d/b/a
 14 ATRINSIC MEDIA), a
 15 Delaware corporation,

16 Plaintiff,

17 vs.

18 SMS.AC, INC. (d/b/a
 19 FanBox), a California
 20 Corporation, BRANDIE
 21 SMITH, an individual,
 22 MICHAEL POUSTI, an
 23 Individual, and DOES 1
 24 through 50, inclusive,

25 Defendants.

26 CASE NUMBER: 09 CV 0099 WQH BLM

27 COMPLAINT FOR DAMAGES AND
 28 OTHER RELIEF FOR:

- (1) BREACH OF CONTRACT;
- (2) FRAUD;
- (3) NEGLIGENT MISREPRESENTATION;
- (4) PROMISSORY ESTOPPEL;
- (5) MONEY HAD AND RECEIVED;
- (6) CONVERSION;
- (7) UNJUST ENRICHMENT; and
- (8) CALIFORNIA UNFAIR COMPETITION

DEMAND FOR JURY TRIAL

BY FAX

CR

1. Plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, and having its principal place of business located in Pearl River, New York.

2. Plaintiff is informed and believes and on that basis alleges that at all times relevant hereto, defendant SMS.AC, INC. (d/b/a FanBox) ("FanBox") has been and is a California corporation with its principal place of business in San Diego, California.

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JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 18 U.S.C. § 1332(a)(1). The amount in controversy exceeds \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

5. Venue is proper in this district because all parties have affirmatively consented to resolving disputes in this district, as part of a contract between them. Venue is also proper pursuant to 28 U.S.C. § 1391(a) and (c), in that the Defendants reside, do business and have engaged in conduct intended or foreseeably likely to cause, and which has caused, injury to Atrinsic in this district.

FACTS

6. On or about April 22, 2008, Atrinsic entered into an agreement with Defendants for advertising services (the "Agreement") related to cellular/mobile phones (a copy of which is attached hereto as Exhibit A) The Agreement provided that Defendants were to develop a registration process for new subscribers (the "Registration Campaign"). The Registration Campaign would allow new subscribers a way to sign up for Atrinsic's promotions.

///

///

1 7. Pursuant to the Agreement, Atrinsic agreed to
 2 pay Defendants \$8.00 for every new subscriber of Atrinsic's
 3 services. Further, Atrinsic agreed to pay Defendants two
 4 hundred and twenty five thousand dollars (\$225,000.00)
 5 (representing 28,125 subscribers) in advance (the "Advance")
 6 immediately upon execution of the Agreement. The Agreement
 7 designated \$75,000.00 of the Advance as "payment for FanBox
 8 to develop the registration process for Atrinsic and is
 9 nonrefundable in the event of termination of the Agreement."
 10

11 8. The Agreement further provided that the
 12 parties were to mutually agree on the creative presentation
 13 and format (the "Creative") for the Registration Campaign.
 14

15 9. Pursuant to the Agreement, upon payment of
 16 the Advance and confirmation that Atrinsic had approved the
 17 Creative, Defendants agreed to "exert best efforts to
 18 complete the registration process for the Atrinsic
 19 Registration Campaign within ten (10) business days of
 20 Creative Approval."
 21

22 10. The Agreement further provided that, after
 23 the above-referenced launch, Defendants would exert best
 24 efforts to deliver "14,000 subscriptions within fourteen
 25 (14) calendar days of the completion of the registration
 26 process," and "a minimum of 1,000 daily subscriptions"
 27 subsequent thereto. Factoring in these numbers, Defendants
 28 represented that they could realistically deliver 28,125

1 subscriptions (the number pre-paid by the Advance) within
2 roughly one month of launch.
3
4

5 11. Each of Atrinsic and Defendants understood
6 that strict adherence to deadlines was critical for this
7 relationship. Indeed, Atrinsic expressly reserved the right
8 to terminate the Agreement if these milestones were not
9 achieved. In such event, the Agreement required Defendants
10 to refund all portions of the Advance "relating to
11 unfulfilled subscriptions."
12

13 12. Because the Agreement was in place, Atrinsic
14 refrained from pursuing an advertising relationship with
15 certain potential partners that it had identified as
16 alternate providers. Atrinsic is informed and believes and
17 based thereon alleges that Defendants were aware and/or
18 reasonably should have expected that Atrinsic would act in
19 this manner.
20

21 13. On April 23, 2008, Atrinsic paid the Advance
22 to Defendants via wire transfer.
23

24 14. On April 28, 2008, one of Atrinsic's
25 representatives, Jonathan Smyth ("Smyth"), communicated the
26 company's approval of the Creative to Defendants for the
27 first time (the "1st Approval").
28

1 15. Ten business days later, Defendants had not
2 launched the Atrinsic Registration Campaign, nor provided
3 any explanation as to why it failed to do so. An Atrinsic
4 representative, Jonathan Katz ("Katz") contacted Defendant
5 Smith and stated that Atrinsic wished to terminate the
6 Agreement.

7
8 16. On May 16, 2008, Katz and Defendant Smith
9 had a phone conversation where the parties agreed to
10 reschedule the launch date ten business days from that date.
11 Katz re-approved the Creative.

12
13 17. On May 19, 2008, defendant Smith
14 acknowledged Atrinsic's approval in writing, and
15 communicated that "[n]o later than Monday, June 2," FanBox
16 "will launch the Atrinsic Registration Campaign." Further
17 Smith stated that Defendants would "undertake best efforts
18 to launch earlier than this date." Atrinsic's Smyth
19 responded by pointing out that Defendants had received the
20 approval on April 16th, not April 19th, and was of the view
21 that the ten (10) business day period was already underway.
22 Smyth also reminded Defendant Smith that Defendants had also
23 been given all of the "posting instructions to create the
24 reg flow," and this allows most Atrinsic partners to be
25 setup within a few days. Defendant Smith stated that
26 Defendants would "do all we can to launch sooner."
27
28

1 18. On May 28, 2008, two days before the date
2 scheduled for the first proposed launch (May 30th),
3 Atrinsic's Smyth asked a technical contact working for
4 Defendants, one Chad Horton ("Horton"), for a status update.
5 Horton replied that "everything is looking great" and that
6 he was confident that the Registration Campaign "will be
7 live on Monday" (i.e. June 2, 2008). Smyth expressed
8 concern about making an untested service public, and said
9 that Atrinsic would like to see at least a demo version live
10 by Friday, May 30, 2008, so that pre-launch testing could be
11 performed.

12
13 19. On May 29, 2008, Horton told Smyth in an
14 email that Defendants' registration system was having
15 problems "aggregating" various items of information for
16 delivery to Atrinsic. Horton proposed implementing an
17 "iFrame" as a work-around, which is a means by which content
18 from one site (e.g. Atrinsic's site) can be viewed through a
19 "frame" on another site (e.g. FanBox's site).

20
21 20. On May 30, 2008, Smyth stated to Horton that
22 the proposed work-around was not at all what was originally
23 agreed to, and would "convert at a much lower rate." Smyth
24 also communicated his frustration that, despite Atrinsic's
25 repeated efforts, Defendants refused to get their technical
26 representatives on a conference call with Atrinsic's
27 representatives in order to discuss the aggregation problem.
28 Smyth also expressed doubt as to whether the Atrinsic

1 project was truly a priority for Defendants. Horton
2 responded by stating that the project was indeed important
3 to Defendants, but that "email is the best method for
4 [communication] so we can keep moving forward."
5

6 21. On June 2, 2008, Defendants' representative,
7 Hank Greenberg, confirmed by telephone that the Registration
8 Campaign would not launch on time.
9

10 22. On June 3, 2008, Smyth again expressed that
11 Atrinsic intended to terminate the Agreement due to
12 Defendants' inability to implement the required deliverables
13 in a timely manner. Atrinsic demanded that the Advance be
14 returned in full.
15

16 23. Another of Defendants' representatives, Bill
17 Zorr, contacted Smyth later that day and asked if alternate
18 arrangements could be made that would cause Atrinsic to
19 reconsider. In response, Smyth proposed that Atrinsic
20 complete the development work on Defendants' behalf, and
21 Defendants' site would display the data via an iFrame, as
22 Horton had earlier suggested. However, in exchange for
23 taking on the development responsibilities, Atrinsic asked
24 that: (i) Defendants' commission rate be reduced from \$8.00
25 per subscriber to roughly \$5.50-\$6.00 per subscriber; (ii)
26 Atrinsic be refunded the entire \$225,000.00 Advance if
27 Defendants did not launch within forty-eight (48) hours of
28 receiving the completed launch materials from Atrinsic; and

1 (iii) that, in any event, the \$75,000.00 allocated in the
2 Advance for Defendants' development costs be refunded (since
3 Atrinsic was now the one doing the development).
4

5 24. Despite the fact that Atrinsic was willing
6 to take over Defendants' development responsibilities, and
7 the data would be displayed via the iFrame work-around (a
8 stop-gap solution Defendants themselves had originally
9 suggested), no response was ever given to Smyth's proposal,
10 and the Registration Campaign still has not launched.
11

12 25. There is now insufficient time in 2008 for
13 Atrinsic to re-start negotiations with any other prospective
14 partners. Plaintiff has lost the revenue that it would have
15 been able to claim this year had Defendants fulfilled their
16 obligations in a timely manner. Hence it has brought the
17 instant action.
18

19 **FIRST CLAIM FOR RELIEF**

20 **(For Breach of Contract - Against All Defendants)**
21

22 26. Atrinsic realleges, and incorporates herein
23 by this reference, the allegations of paragraphs 1 through
24 25 hereof, inclusive.
25

26 27. On or about April 22, 2008, Atrinsic and
27 Defendants entered into a written contract, the Agreement.
28

1 28. Atrinsic has performed all conditions,
2 covenants, and promises required on its part to be performed
3 in accordance with the terms and conditions of the
4 Agreement, save those which are excused due to Defendants'
5 acts in breach of the Agreement.
6

7 29. As outlined in detail above, Atrinsic has
8 provided Defendants with several opportunities to complete
9 the Registration Campaign in a timely manner or, at minimum,
10 to refund the Advance. However, Defendants have failed to do
11 either of these things, and are in breach of the Agreement.
12

13 30. Defendants have also breached the covenant of
14 good faith and fair dealing, which is implied into the
15 Agreement under California law, by giving empty promises
16 (which they had no intention of fulfilling) to complete the
17 Registration Campaign on schedule, and later by their bad
18 faith refusal to refund the Advance, despite their complete
19 failure to perform.
20

21 31. As a direct and foreseeable result of
22 Defendants' acts in breach of the Agreement (including the
23 covenant of good faith and fair dealing implied therein),
24 Atrinsic has been damaged in an amount to be proven at
25 trial, but in no event less than three hundred sixty five
26 thousand dollars (\$365,000.00), representing the \$225,000.00
27 Advance plus the profits that Atrinsic would have made on
28 those 28,125 subscribers. Atrinsic is also entitled to

1 prejudgment interest and costs. Further, the Agreement
 2 provides for the recovery of attorneys' fees resulting from
 3 or in connection with an action for "breach of any
 4 agreement, representation or warranty herein." Defendants
 5 have breached the Agreement, so Atrinsic is further entitled
 6 to recover reasonable attorneys' fees from them.

7
 8 **SECOND CLAIM FOR RELIEF**

9 **(For Fraud - Against All Defendants)**

10
 11 32. Atrinsic realleges, and incorporates herein
 12 by this reference, the allegations of paragraphs 1 through
 13 31 hereof, inclusive.

14
 15 33. On or about May 19, 2008 defendant Smith,
 16 acting on behalf of herself and the other Defendants, and
 17 each of them, promised and represented to Smyth and Katz in
 18 writing that "[n]o later than Monday, June 2," Defendants
 19 "will launch the Atrinsic Registration Campaign." Further,
 20 Smith represented that Defendants would "undertake best
 21 efforts to launch earlier than this date."

22
 23 34. Atrinsic is informed and believes, and
 24 therefore alleges, that at the time said promise was made,
 25 neither Smith nor any of the other Defendants had any
 26 intention of completing the Registration Campaign on
 27 schedule or refunding the Advance.
 28

1 35. Atrinsic is informed and believes, and on
2 that basis alleges, that the above-referenced promise was
3 made with the intent to induce Atrinsic to, *inter alia*: (i)
4 forestall the termination of the Agreement and demand for
5 the return of the Advance; (ii) refrain from pursuing
6 similar relationships with other mobile marketing partners;
7 and/or (iii) forego bringing legal action against
8 Defendants (such as this lawsuit).

9
10 36. Atrinsic did, in fact, rely on this promise
11 to its detriment, by, *inter alia*: (i) forestalling the
12 termination of the Agreement and demand for the return of
13 the Advance; (ii) refraining from pursuing similar
14 relationships with other mobile marketing partners; and
15 (iii) forgoing the institution of formal legal action
16 against Defendants (such as this lawsuit).

17
18 37. Atrinsic is further informed and believes,
19 and on that basis alleges, that Defendants knew or
20 reasonably should have expected that in making said promise,
21 Atrinsic would so rely.

22
23 38. As a direct and proximate result of
24 Defendants' tortious conduct, Atrinsic has suffered damage,
25 in an amount to be determined at trial, but in no event less
26 than three hundred sixty five thousand dollars
27 (\$365,000.00), plus prejudgment interest, costs and
28 reasonable attorneys' fees.

1 39. Further, Atrinsic is informed and believes,
2 and on that basis alleges that Defendants' actions were
3 willful, malicious, and done with a conscious disregard for
4 Atrinsic's rights. As such, Defendants should be deemed to
5 have committed intentional fraud, entitling Atrinsic to
6 punitive and exemplary damages according to proof at trial
7 in order to make an example out of the Defendants and deter
8 similar conduct.

9
10 **THIRD CLAIM FOR RELIEF**

11 **(Negligent Misrepresentation - Against All Defendants)**

12
13 40. Atrinsic realleges, and incorporates herein
14 by this reference, the allegations of paragraphs 1 through
15 39 hereof, inclusive.

16
17 41. Smith, acting on behalf of both herself and
18 the other Defendants, and each of them, had no reasonable
19 grounds for believing that her representations regarding the
20 launch of the Registration Campaign were true, and instead
21 made them with the intent to induce Atrinsic to act in
22 detrimental reliance as herein alleged.

23
24 42. As a direct and proximate result of
25 Defendants' negligent conduct, Atrinsic has suffered damage
26 in an amount to be determined at trial, but in no event less
27 than three hundred sixty five thousand dollars
28

1 (\$365,000.00), plus prejudgment interest, costs and
2 reasonable attorneys' fees.

3
4 **FOURTH CLAIM FOR RELIEF**

5 **(Promissory Estoppel - Against All Defendants)**

6
7 43. Atrinsic realleges, and incorporates herein
8 by this reference, the allegations of paragraphs 1 through
9 42 hereof, inclusive.

10
11 44. As a direct and foreseeable result of
12 Defendants' promise, Atrinsic has suffered damage, in an
13 amount to be determined at trial, but in no event less than
14 three hundred sixty five thousand dollars (\$365,000.00),
15 plus prejudgment interest, costs and reasonable attorneys'
16 fees.

17
18 45. Injustice can be avoided only by enforcing
19 Defendants' promise completely.

20
21 **FIFTH CLAIM FOR RELIEF**

22 **(Money Had and Received - Against All Defendants)**

23
24 46. Atrinsic realleges, and incorporates herein
25 by this reference, the allegations of paragraphs 1 through
26 45 hereof, inclusive.

1 47. On or about April 22, 2008 Defendants became
2 indebted to Atrinsic in the sum of two hundred and twenty
3 five thousand dollars (\$225,000.00) for money had and
4 received by Defendants for Atrinsic's use and benefit.
5 Defendants are fully aware of said debt.
6

7 48. Atrinsic has demanded payment of this money
8 from Defendants, but to no avail. The last demand was made
9 on or about June 26, 2008.
10

11 49. No payment has been made by Defendants, and
12 there is now owing the sum of two hundred and twenty five
13 thousand dollars (\$225,000.00), with prejudgment interest on
14 that amount plus costs.
15

16 50. The Agreement provides that in the event
17 legal action is taken for a breach of any "agreement,
18 representation or warranty" contained therein, attorneys'
19 fees may be recovered. As such, Atrinsic is entitled to
20 recover reasonable attorneys' fees from Defendants.
21

22 **SIXTH CLAIM FOR RELIEF**

23 **(Conversion- Against All Defendants)**
24

25 51. Atrinsic realleges, and incorporates herein
26 by this reference, the allegations of paragraphs 1 through
27 50 hereof, inclusive.
28

1 52. On or about April 23, 2008, Atrinsic wired
2 the two hundred and twenty five thousand dollar
3 (\$225,000.00) Advance to Defendants pursuant to the
4 Agreement. Defendants were then obligated to use their best
5 efforts to launch the Registration Campaign within the time
6 allotted in the Agreement. Defendants further agreed, in the
7 event that the Registration Campaign was not launched on
8 schedule, to return the Advance to Atrinsic.

9
10 53. Despite the fact that the Registration
11 Campaign was not launched on schedule (or at all),
12 Defendants still retains possession of the two hundred and
13 twenty five thousand dollar (\$225,000.00) Advance.

14
15 54. Atrinsic has demanded payment of this money
16 from Defendants, but to no avail. The last demand was made
17 on or about June 26, 2008.

18
19 55. As a direct and proximate result of
20 Defendants' wrongful exercise of dominion over the Advance,
21 Atrinsic has been damaged, in an amount to be determined at
22 trial but in no event less than the converted sum of two
23 hundred twenty five thousand dollars (\$225,000.00), plus
24 prejudgment interest and the costs of recovering said sum,
25 along with reasonable attorneys' fees.

26
27 56. Further, Atrinsic is informed and believes,
28 and on that basis alleges that Defendants' acts of

1 conversion were willful, malicious, and done with a
 2 conscious disregard for Atrinsic's rights. As such, Atrinsic
 3 is entitled to punitive and exemplary damages according to
 4 proof at trial in order to make an example out of the
 5 Defendants and deter similar conduct.

6
 7 **SEVENTH CLAIM FOR RELIEF**

8 **(Unjust Enrichment - Against All Defendants)**

9
 10 57. Atrinsic realleges, and incorporates herein
 11 by this reference, the allegations of paragraphs 1 through
 12 56 hereof, inclusive.

13
 14 58. As set forth above, Atrinsic paid the
 15 Advance to Defendants pursuant to the Agreement, with the
 16 reasonable expectation that Defendants would either launch
 17 the Registration Campaign on schedule or, at minimum, return
 18 the Advance to Atrinsic.

19
 20 59. The Registration Campaign did not launch on
 21 schedule (or at all), yet Defendants still have not refunded
 22 the Advance.

23
 24 60. Defendants voluntarily accepted and
 25 benefitted from the Advance, and it would be inequitable and
 26 unconscionable to allow them to continue to do so, despite
 27 their complete failure to satisfy their obligations or
 28 provide any benefit whatsoever to Atrinsic.

1 61. As such, Atrinsic is entitled to restitution
2 of the Advance, as well as disgorgement of any profits,
3 gains and advantages obtained via Defendants' use and
4 enjoyment thereof, the exact amount of which is extremely
5 difficult to calculate and is presently unknown, but which
6 will be proven at trial in an amount exceeding the
7 jurisdictional minimum of this Court.

8
9 **EIGHTH CLAIM FOR RELIEF**

10 **(California Unfair Competition - Against All Defendants)**

11
12 62. Atrinsic realleges, and incorporates herein
13 by this reference, the allegations of paragraphs 1 through
14 61 hereof, inclusive.

15
16 63. Defendants' unlawful and fraudulent conduct
17 constitutes unfair competition, within the meaning of
18 Business and Professions Code Section 17203.

19
20 64. As a direct and proximate result of
21 Defendants' unfair competition, Atrinsic has suffered and
22 continues to suffer injury in fact by losing money and/or
23 property in an amount to be proven at trial, but in no event
24 less than the jurisdictional minimum of this Court.

25
26 65. Atrinsic is informed and believes and on
27 that basis alleges that Defendants' have obtained certain
28 profits, gains and advantages as a result of their unfair

1 competition. The full extent of these profits, gains and
2 advantages remains unknown, and will be established
3 according to proof at trial, but is in no event less than
4 the jurisdictional minimum of this Court.

5
6 66. Atrinsic is entitled to restitution,
7 including disgorgement of profits, pursuant to California
8 Business & Professions Code Section 17203, of any money or
9 property it lost or Defendants' acquired by way of unfair
10 competition.

11
12 **PRAYER FOR RELIEF**

13
14 WHEREFORE, Atrinsic prays for judgment against
15 Defendants as follows:

16
17 1. On the First and Fourth cause of action:

- 18
19 • for compensatory damages in an amount to be
20 proven at trial, but in no event less than
21 three hundred sixty five thousand dollars
22 (\$365,000.00);

- 23 • for prejudgment interest and costs of suit;

- 24 • for reasonable attorneys' fees;

25
26 2. On the Second, Third and Sixth causes of action:
27
28

- for compensatory damages in an amount to be proven at trial, but in no event less than three hundred sixty five thousand dollars (\$365,000.00);
- for punitive and exemplary damages in an amount to be proven at trial;
- for prejudgment interest and costs of suit;
- for reasonable attorneys' fees;

3. On the Fifth, Seventh and Eighth causes of action:

- for restitution of the \$225,000.00 Advance;
- for disgorgement of any profits, gains or advantages wrongfully obtained by Defendants;
- for prejudgment interest and costs of suit;
- for reasonable attorneys' fees;

4. For any other relief as this Court may deem just and proper.

DATED: January 16, 2009

GENGA & ASSOCIATES, P.C.



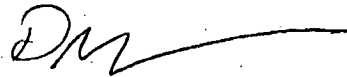
Don C. Moody, Esq.
Attorneys for Plaintiff
NEW MOTION, INC.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure and Local Rule 38.1, Atrinsic hereby demands trial by jury on all matters so triable.

DATED: January 16, 2009

GENGA & ASSOCIATES, P.C.



Don C. Moody, Esq.
Attorneys for Plaintiff
NEW MOTION, INC.

ORIGINAL

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

NEW MOTION, INC. (d/b/a ATRINISIC MEDIA)

(b) County of Residence of First Listed Plaintiff Rockland (NY)
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

GENGA & ASSOCIATES, P.C., 15260 VENTURA BLVD., SUITE
1810, SHERMAN OAKS, CA 91403, 818-444-4580

DEFENDANTS

SMS.AC, INC., BRANDIE SMITH MICHAEL POUSTI

County of Residence of First Listed Defendant San Diego
(EXCEPT IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Any)

N/A

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 PTF ☒ 1 DEF ☐ 1 Incorporated or Principal Place of Business In This State ☐ 4 PTF ☒ 4 DEF
- Citizen of Another State ☐ 2 PTF ☐ 2 DEF ☐ 2 Incorporated and Principal Place of Business In Another State ☒ 5 PTF ☐ 5 DEF
- Citizen or Subject of a Foreign Country ☐ 3 PTF ☐ 3 DEF ☐ 3 Foreign Nation ☐ 6 PTF ☐ 6 DEF

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input checked="" type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 861 HIA (1395m)	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability		<input type="checkbox"/> 690 Other	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 810 Selective Service
<input checked="" type="checkbox"/> 190 Other Contract			<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 790 Other Labor Litigation		<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act		<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 535 Death Penalty			<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other			<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 550 Civil Rights			<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 555 Prison Condition			<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
	<input type="checkbox"/> 440 Other Civil Rights				<input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332

Brief description of cause:

DIVERSITY CLAIM FOR BREACH OF CONTRACT, FRAUD, NEGLIGENCE MISREPRESENTATION,

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

01/16/2009

FOR OFFICE USE ONLY

RECEIPT #

159097

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

LAC

1/16/09

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

159097 - TC

**January 16, 2009
15:40:46**

Civ Fil Non-Pris

USAO #.: 09CV0099

Judge.: WILLIAM Q HAYES

Amount.: \$350.00 CK

Check#.: 3055146

Total-> \$350.00

FROM: NEW MOTION VS SMS AC INC